

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DENNIS CAPPS,

Petitioner,

v.

CIOLLI,

Respondent.

Case No. 1:20-cv-00766-AWI-SAB-HC

ORDER ADOPTING FINDINGS AND
RECOMMENDATION, DENYING
RESPONDENT'S MOTION TO DISMISS,
AND REFERRING MATTER BACK TO
MAGISTRATE JUDGE

(ECF Nos. 10, 17)

Petitioner is a federal prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. This matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On August 4, 2021, the Magistrate Judge issued Findings and Recommendation that recommended Respondent's motion to dismiss be denied. (ECF No. 17). On August 16, 2021, Respondent filed objections. (ECF No. 18). On August 26, 2021, Petitioner filed a reply to the objections. (ECF No. 20).

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), this Court has conducted a *de novo* review of the case. Having carefully reviewed the entire file, including Respondent's objections, the Court concludes that the Findings and Recommendation is supported by the record and proper analysis, and there is no need to modify the Findings and Recommendation.

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1 “Generally, motions to contest the legality of a sentence must be filed under § 2255,”
2 *Hernandez v. Campbell*, 204 F.3d 861, 864 (9th Cir. 2000), but a “federal prisoner may file a
3 habeas petition under § 2241 to challenge the legality of a sentence when the prisoner’s remedy
4 under § 2255 is ‘inadequate or ineffective to test the legality of his detention,’” *Harrison v.*
5 *Ollison*, 519 F.3d 952, 956 (9th Cir. 2008). “[A] § 2241 petition is available under the ‘escape
6 hatch’ of § 2255 when a petitioner (1) makes a claim of actual innocence, and (2) has not had an
7 ‘unobstructed procedural shot’ at presenting that claim.” *Stephens v. Herrera*, 464 F.3d 895, 898
8 (9th Cir. 2006) (citations omitted).

9 In this circuit, a claim of actual innocence for purposes of the
10 escape hatch of § 2255 is tested by the standard articulated by the
11 Supreme Court in *Bousley v. United States*, 523 U.S. 614, 118
12 S.Ct. 1604, 140 L.Ed.2d 828 (1998): “To establish actual
13 innocence, petitioner must demonstrate that, in light of all the
14 evidence, it is more likely than not that no reasonable juror would
have convicted him.” *Id.* at 623, 118 S.Ct. 1604 (internal quotation
marks omitted); *see also Lorentsen*, 223 F.3d at 954 (quoting this
passage from *Bousley*).

15 *Stephens*, 464 F.3d at 898.

16 In *Marrero v. Ives*, 682 F.3d 1190 (9th Cir. 2012), the Ninth Circuit “left open the
17 ‘question whether a petitioner may ever be actually innocent of a noncapital sentence for the
18 purpose of qualifying for the escape hatch.’” *Allen v. Ives*, 950 F.3d 1184, 1189 (9th Cir. 2020)
19 (quoting *Marrero*, 682 F.3d at 1193). In *Allen v. Ives*, that question was answered in the
20 affirmative. 950 F.3d at 1189–90. The petitioner in *Allen* “filed a § 2241 petition, relying on
21 *Mathis* and *Descamps*, to challenge his sentence as a career offender.” *Shepherd v. Unknown*
22 *Party, Warden, FCI Tucson*, 5 F.4th 1075, 1077 (9th Cir. 2021) (citing *Allen*, 950 F.3d at 1188–
23 89). The petitioner had been sentenced when the sentencing guidelines were mandatory, and the
24 Ninth Circuit “held that the defendant could establish actual innocence of the mandatory
25 sentencing enhancement” for purposes of qualifying for the escape hatch. *Shepherd*, 5 F.4th at
26 1077 (citing *Allen*, 950 F.3d at 1189–90). Subsequently, the Ninth Circuit clarified that “based
27 on our reasoning in *Allen*, the concurrence to the denial of rehearing en banc in that case, and
28 persuasive precedent from other circuits and district courts within our own circuit, we limit

1 *Allen*’s application to petitioners who ‘received a mandatory sentence under a mandatory
 2 sentencing scheme.’” *Shepherd*, 5 F.4th at 1078 (quoting *Allen v. Ives*, 976 F.3d 863, 869 (9th
 3 Cir. 2020) (W. Fletcher, J., concurring in denial of reh’g en banc)).

4 In this case, Petitioner was sentenced to a statutory mandatory sentence of life
 5 imprisonment post-*Booker*. The undersigned has previously applied *Allen* to a petitioner who
 6 was sentenced to a statutory mandatory sentence of life imprisonment post-*Booker*, as has
 7 another district judge in this district. See *Lii v. Ciolli*, No. 1:20-cv-00786-AWI-EPG, 2021 U.S.
 8 Dist. LEXIS 97930 (E.D. Cal. May 24, 2021), *adopting findings and recommendation*, 2021 U.S.
 9 Dist. LEXIS 68181 (E.D. Cal. Apr. 5, 2021); *Gonzalez v. Ciolli*, No. 1:20-cv-00724-DAD-SKO,
 10 2021 U.S. Dist. LEXIS 50406, at *8–9 (E.D. Cal. Mar. 16, 2021) (“The fact that petitioner was
 11 sentenced post-*Booker* when the sentencing guidelines were advisory is irrelevant to the
 12 determination of whether petitioner can satisfy the demanding actual innocence exception to
 13 qualify for the escape hatch jurisdiction under 28 U.S.C. § 2255(e). Petitioner was sentenced to
 14 the statutory mandatory sentence of life imprisonment pursuant to 21 U.S.C. §§ 841, 851 – a
 15 mandatory sentence under a mandatory sentencing scheme as described by the Ninth Circuit in
 16 *Allen*. Accordingly, the undersigned declines to adopt the magistrate judge’s recommendation
 17 that this case be summarily dismissed due to lack of jurisdiction.”).

18 In the objections, Respondent argues that *Allen* is “limited to cases wherein a defendant,
 19 unlike Petitioner Capps, received a pre-*Booker* mandatory guideline sentence,” and that there is
 20 no § 2241 jurisdiction for petitioners sentenced under the advisory sentencing guidelines. (ECF
 21 No. 18 at 1, 2). Here, however, Petitioner did not receive an advisory guidelines sentence, but
 22 was sentenced to a statutory mandatory sentence of life imprisonment. Further, the decisions
 23 cited by Respondent in support of this argument are distinguishable from the instant matter
 24 because they involved a plea-bargained “term of imprisonment not to exceed the low end of the
 25 applicable guidelines range, as determined by the Court at the time of sentencing,” *Jaramillo v.*
 26 *United States*, No. CV-19-8017-PCT-SPL (JFM), 2020 U.S. Dist. LEXIS 83075, at *3 (D. Ariz.
 27 May 11, 2020), *report and recommendation adopted*, 2020 U.S. Dist. LEXIS 98123 (D. Ariz.
 28 June 4, 2020), and a “sentence[] under the advisory sentencing guidelines,” *McKenzie v.*

1 *Martinez*, No. EDCV 20-1419-VAP (KK), 2021 U.S. Dist. LEXIS 51696, at *7 (C.D. Cal. Jan.
2 12, 2021), *report and recommendation adopted*, 2021 U.S. Dist. LEXIS 66853 (C.D. Cal. Apr. 5,
3 2021), rather than a statutory mandatory sentence like Petitioner.

4 Respondent also contends that “[f]ollowing *Shepherd*, this Court has consistently
5 recommended denial of jurisdiction under § 2241 to petitioners claiming *Allen* actual innocence
6 to post-*Booker*, advisory guidelines, sentence enhancement.” (ECF No. 18 at 3). Again,
7 Petitioner did not receive an advisory guidelines sentence, and the cases to which Respondent
8 cites are distinguishable because they involved an “accepted plea-bargained . . . sentence,”
9 *Barrett v. Ciolli*, No. 1:20-cv-00599-HBK, 2021 U.S. Dist. LEXIS 139050, at *3 (E.D. Cal. July
10 26, 2021), and “a sentence . . . which was at the low end of the advisory sentencing guidelines,”
11 *Nichols v. Ciolli*, No. 1:20-cv-00785-NONE-HBK, 2021 U.S. Dist. LEXIS 152227, at *3 (E.D.
12 Cal. Aug. 12, 2021) (internal quotation marks and citation omitted), rather than a statutory
13 mandatory sentence like Petitioner.

14 Respondent fails to demonstrate how Petitioner’s statutory mandatory sentence of life
15 imprisonment is not “a mandatory sentence under a mandatory sentencing scheme.” *Shepherd*, 5
16 F.4th at 1078 (internal quotation marks and citation omitted). Accordingly, the Court finds that
17 *Allen* is applicable and that Petitioner may proceed with his § 2241 petition pursuant to the
18 escape hatch.

19 Based on the foregoing, IT IS HEREBY ORDERED that:

- 20 1. The Findings and Recommendation issued on August 4, 2021 (ECF No. 17) is
21 ADOPTED IN FULL;
22 2. Respondent’s motion to dismiss (ECF No. 10) is DENIED; and
23 3. The matter is referred back to the Magistrate Judge for further proceedings.

24 IT IS SO ORDERED.
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26 Dated: September 2, 2021


27 SENIOR DISTRICT JUDGE
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